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Brief of Gregory & Hicks for Pet.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

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THE KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY COMPANY,

Petitioner,

vs.

ROSA R. JARMAN,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Eighth Circuit.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR THE PETITIONER.

S. S. GREGORY,
HERVEY BRYAN HICKS,
Attorneys for Petitioner.

(18,065.)

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This case is before the court pursuant to a writ of certiorari issued March 11, 1901, to the Circuit Court of Appeals for the Eighth Circuit.

Without restating the facts which appear fully in the petition for the writ the point will be taken up in the order adopted in petitioner's original brief, which is referred to and made a part of this argument.

I.

The suicide statute of Missouri is at most only a declaration of the policy of the state with reference to the defense of suicide. The legislature said that no insurance company should evade the risk of suicide by a stipulation with the insured, unless the insured intended to kill himself when he applied for insurance. Later an act was passed providing for the incorporation and regulation of a new class of companies, the distinguishing characteristic of which was the method of collecting revenue, by an "assessment upon others "holding similar contracts." (Sec. 5860, Rev. St. Mo., 1889.) The legislature saw fit, for reasons of its own, to provide by this new law that foreign companies doing business under it should not be subject to the general insurance laws, including the suicide statute.

Haynie v. *Indem. Co.*, 139 Mo., 416; 41 S. W., 461, 462.

Sparks v. *Indem. Co.*, 61 Mo. App., 109.

Hanford v. *Mass. Ben. Assn.*, 122 Mo., 50; 26 S. W., 680, 682.

Jacobs v. *Omaha Life Assn.*, 142 Mo., 49; 43 S. W., 375.

Aloe v. *Mut. Res. Fund Assn.*, 147 Mo., 561; 49 S. W., 553, 556.

Aloe v. *Fidel. Mut. Life Assn.*, 55 S. W., 993, 998.

McDonald v. *Bankers' Life Assn.*, 55 S. W., 999, 1001.

Elliott v. *Des Moines Life Assn.*, 63 S. W., 400, 406.

By its compliance with the act of 1887 (Rec., 39), and

by the certificate of authority which it received from the insurance department to do business under said act, the defendant company became "subject to the provisions of "this act and each member submitted himself and his con- "tract to the provisions and limitations of said act."

Ellerbe v. *Aid Association*, 106 Mo., 13, 17.
Ellerbe v. *Benefit Assn.*, 114 Mo., 501, 507.

In these cases the associations had reorganized under the law of 1887 and afterwards became insolvent. Assessments had been made to pay certain benefits, and the question was whether the proceeds should be distributed according to the old law or according to the law of 1887 and it was held that when the companies were reorganized the old contracts were submitted to the new law and became subject to it. The principle is the same here. The policy of the state in reference to assessment insurance was changed by the statute of 1887, and this change in policy permitted the contract of the parties to take effect in the form in which it was first written. In addition to the cases cited in our original brief the following are instructive.

In *Butler* v. *U. S. Savings & Loan Co. et al.*, 97 Tenn., 679; 37 S. W., 385, the corporation had taken a mortgage on real estate in Tennessee without first complying with a statute requiring registration of corporation charters with the Secretary of State and the filing of a copy in the county where the property was situate, but before the suit was brought it complied with the law. A bill was filed to enforce a vendor's lien against the mortgagor in which the mortgage was attacked as void and inoperative and the Chancellor so held. After the decree was entered and the mortgagee, de-

fendant, had appealed, an act was passed postponing the foreclosure of such mortgages for two years and validating contracts, made by corporations, so in default. It will be remembered that the constitution of Tennessee contains a provision which prohibits the passage of "a retrospective law, "or law impairing the obligation of contracts." The Supreme Court, however, quoted with approval the language used by the Supreme Court of the United States in *Gross v. U. S. Mortgage Co.*, 108 U. S., 477; 2 Sup. Ct., 940, as follows:

"That the act in question is not repugnant to the consti-
"tution, as impairing the obligation of a contract, is, in view
"of the settled doctrines of this court, entirely clear. Its
"original invalidity was placed by the court below upon the
"ground that the statutes and public policy of Illinois for-
"bade a foreign corporation from taking a mortgage upon
"real property in that state to secure a loan of money.
"Whether that inhibition should be withdrawn was, so far,
"at least, as the immediate parties to the contract were con-
"cerned, a question of policy, rather than of constitutional
"power. When the legislative department removed the in-
"hibition imposed, as well by statute as by the public pol-
"icy of the state, upon the execution of a contract like this,
"it can not be said that such legislation, although retrospec-
"tive in its operation, impaired the obligation of the con-
"tract. It rather enables the parties to enforce the contract
"they intended to make. It is, in effect, a legislative dec-
"laration that the mortgagor shall not, in a suit to enforce
"the lien given by the mortgage, shield himself behind any
"statutory prohibition or public policy which prevented the
"mortgagee, at the date of the mortgage, from taking the
"title which was intended to be passed as security for the
"mortgage debts,"

and held that the mortgage was valid. Complainant contended further that his rights were fixed by the filing of a bill, prior to the passage of the statute, but the court recited

a clause in his original contract which provided that his lien should be second to the mortgage, and said:

"Even if complainant could at all invoke the doctrine of "vested rights, he is in no condition, on this record, to com- "plain of this legislation as retrospective, within the con- "stitutional prohibition, when its effect is to place him in "the exact position which he contracted for at the time of "the execution of his deed."

The same language is expressly applicable to this case.

The measure of retrospective legislation is to ascertain whether or not it takes away any vested right which existed before the new law became operative. Thus, in *Leete* v. *State Bank*, 115 Mo., 134; 21 S. W., 788, 792, the Supreme Court of Missouri passes upon the statute of Missouri providing that the personal property of married women shall be their separate property, and further providing: "This "act shall not affect the title of any husband to any per- "sonal property reduced to possession, with the express as- "sent of his wife," given in writing. The court stated the rights which the husband had in respect to the wife's personal property the day before this act went into effect, and proceeded to say that these were vested rights arising out of contract or the principles of the common law, which could not be taken away by the legislature.

In *Hope Mutual* v. *Flynn*, 38 Mo., 483, the court said:

"A statute which takes away any vested right acquired "under existing laws, or creates a new obligation, or im- "poses a new duty or attaches a new disability in respect "to transactions or considerations already passed, is to be "deemed retrospective or retroactive."

Again, in *Fisher* v. *Patton*, 134 Mo., 52; 33 S. W., 451,

456, in discussing an amendatory act and the power of repeal, the court said: "The amendatory act can not affect "vested rights, and plaintiff's rights are vested." Plaintiff's rights in this case depended upon a contract between him and a building and loan association of which he was a member, as made by a by-law, and the law under which the association was incorporated.

Does it appear that the law of 1887, in effect repealing the suicide statute of Missouri as to assessment companies, comes within the tests of a retrospective law? What right was vested in Jarman, or in his beneficiary, by virtue of the existence of the statute in question? Did he acquire a vested right to commit suicide, that is, to take his own life, while he was in sound mind, without thereby avoiding any insurance policy he may have had providing for such avoidance? He did not have this right at common law, even if there was no provision in the contract respecting suicide.

> *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S., 139; 18 Sup. Ct., 300, 305.

Jarman's beneficiary could not acquire anything but an expectancy during his lifetime, because the right was reserved to him to change his beneficiary at any time without her consent.

> *Martin* v. *Stubbings*, 126 Ill., 387; 18 N. E., 657.
>
> *Hopkins* v. *North Western Life Assn.*, 99 Fed., 199.
>
> *Wist* v. *Grand Lodge*, 22 Ore., 271; 29 Pac., 610.
>
> *Society* v. *Burkhart*, 110 Ind., 192; 10 N. E., 79, 80, and 11 N. E., 449.

Sabin v. *Phinney,* 134 N. Y., 423; 31 N. E., 1087.

Chambers v. *Supr. Tent* (1901), 49 Atl. (Pa.), 784.

Carpenter v. *Knapp* (1898), 70 N. W. (Ia.), 765, 767, and cases there cited.

Supr. Coun. v. *Morrison,* 16 R. I., 468; 17 Atl., 57.

Peterson v. *Gibson,* 61 N. E. (Ill.), 127.

Is it not more reasonable to say that the legislature intended to deny to insurance companies the *defense* of suicide as a matter of policy, and later decided to withdraw assessment companies from the operation of the law denying such right?

Another test which has been applied is to determine whether or not the new law creates for the parties a contract which did not before exist. This can not be said to have been done by the law of 1887, for the contract of the parties was to do that which was entirely within the law and consistent with good morals, except for this prohibitive statute. Its repeal rather enabled the parties to enforce the contract as it was made. In a certain contingency, quite remote, the law would not permit the parties to enforce a certain provision of the contract: in such event there was no remedy for the company, and the new law enabled the parties to enforce the contract by taking away the obstruction to the remedy which existed, by virtue of the prohibition of the statute. Thus, in *Campbell* v. *Holt,* 115 U. S., 620; 6 Sup. Ct., 209, 213, where this court was discussing a change affecting a statute of limitations, the court said:

"There are numerous cases where a contract incapable "of enforcement for want of a remedy, or because there is "some obstruction to the remedy, can be so aided by legis- "lation as to become the proper ground of a valid action; "as in the case of a physician, practicing without license, "who was forbidden to compel payment for his service by "suit. The statute being repealed which made this pro- "hibition, he recovered in the court a judgment for the "value of his services on the ground that the first statute "only affected the remedy. (*Hewitt* v. *Wilcox*, 1 Mete., "154.) Of like character is the effect of a repeal of the "laws against usury, in enabling parties to recover on con- "tracts in which the law forbids such recovery before the "repeal. (*Wood* v. *Kennedy*, 19 Ind., 68; *Welch* v. *Wads- "worth*, 30 Conn., 149; *Butler* v. *Palmer*, 1 Hill, 324; "*Hampton* v. *Com.*, 19 Pa. St., 329; *Bauer* v. *Nelson*, 9 "Gill., 304.) In all this class of cases the ground taken is "that there exists a contract, but, by reason of no remedy "having been provided for its enforcement, or the remedy "ordinarily applicable to that class having, for reasons of "public policy, been forbidden or withheld, the legislature, "by providing a remedy where none exists, or removing the "statutory obstruction to the use of the remedy, enables the "party to enforce the contract, otherwise unobjectionable."

So, in *Curtis* v. *Leavitt*, 15 N. Y., 1, 85, a corporation having the right to set up usury under the law existing at the time of making the contract, was cut off from the defense by a subsequent law prohibiting corporations from making it, and it was not held to be retrospective.

In *Berry* v. *Clary*, 77 Maine, 482; 1 Atl., 360, a person having made a note on Sunday set up the fact in defense, but a later statute was passed providing that such defense should not be made unless the consideration received had been returned, and it was held that there was no vested right in the law as it existed when the contract was made, and that the new law cutting off the defense was not retrospective.

In *Medical College* v. *Muldoon*, 46 Ala., 603, a satute imposing upon foreign insurance companies doing business in Mobile the annual payment of $200 to a certain college, was repealed before trial of a suit to recover the amount due up to the time of the repeal. It was held that the college had no vested right to recover.

In *Insurance Co.* v. *Cushman*, 108 U. S., 51, 65; 2 Sup. Ct., 408, the appellant had become a purchaser at a decretal sale under a mortgage and the statute in force at the time of making the mortgage provided for 10 per cent. interest on the amount bid at such a sale. Before the sale this rate was reduced to 8 per cent. by an amendment of the law. In reply to the claim that the mortgagee had a vested right in the statute, the court held that a decretal sale might never have been made, that the mortgagee might not have been the purchaser, and, finally, that these contingencies were too remote; that the change in the law did not constitute an impairment of the contract.

In *Hartford Fire Insurance Company* v. *C., M. and St. P. R. R. Co.*, 62 Fed., 904, 909, a lease was executed by a railroad company for a part of its grounds for the erection of a storage warehouse, with a clause releasing the company from liability for damages to the property caused by fire originating from sparks or through negligence of its employes. At the time the lease was executed, the law, under a decision of the Supreme Court, was that such a condition was against the public policy of the State of Iowa. After the contract was made and before suit was brought the Supreme Court overruled the case relied upon; after citing

Ewell v. *Daggs,* as quoted in petitioner's original brief, the court said:

"The rule applicable to cases of the character of that now "before the court wherein the party *seeks to evade the obli-* "*gation of the contract* to which he is a party, on the ground "of *public policy*, is that the court shall not render its aid "to enforce the contract, *if at the time the aid is sought* "*the contract is contrary to the then existing public policy.* "The court in such case *refuses its aid* for the enforcement "of the contract, *not because such is the right of either of* "*the contracting parties*, but because the *public interests* "*are adverse* to the enforcement of the contract. If, how- "ever, at the time when the aid of the court is sought to en- "force the terms of an existing contract, the *public inter-* "*ests do not* demand that the court should refuse this aid "in enforcing the contract according to its terms, the court "would *not be justified* in refusing its aid simply because "*at some previous time under the then existing laws*, and as "circumstances then were, such aid would have been re- "fused if then demanded."

It was held that as the then existing policy did not prohibit the railroad company from exempting itself from liability, etc., the clause of the lease might be enforced.

An examination of all the authorities available touching the subject leads to the conclusion that where a substantial right accrues to an individual from the provisions of the contract of the parties, or arises from general principles of the common law, or from statutes in harmony with the contract and upon the existence of which its enforcement depends, the individual acquires a vested right to have the law remain unchanged as to the contract or subject-matter in question. But, on the other hand, when a statute is in existence at the time of making a contract which denies to one of the parties thereto the assistance of the courts in the en-

forcement of the contract or of some provision of it, making that provision void or inoperative, such a statute is declaratory of the policy of the state with regard to the class of contracts mentioned; the one party is affected adversely by the prohibition and has no remedy for the time being, but the opposite party does not thereby acquire any vested right to have the policy of the state remain unchanged, and the legislature has power to make the change; thereby restoring the remedy or defense to the party who was until then under a disability.

There is no hard and fast line between that which is inviolable and that which is not, but it is confidently asserted that a prohibitive statute cutting off a defense provided for in a contract, to be effective in a stated contingency, was not intended to be within the constitutional limitation. Every case must be determined upon its own facts.

In *Lovern* v. *Lamprey*, 22 N. H. (2 Fost.), 434, a statute providing that any estate acquired by a testator after making his will shall pass thereby, if such appear to have been his intention, was held not to be retrospective in its operation on a will made before its enactment, in that it changes the rule of construction, so that after-required property passed by the will, which would not have passed by the common law; for until the death of the testator no rights vested under the will. In that case the statute operated upon an instrument in which there was no vested right until his death. So here the statute of 1887, acted upon a contract, before then subject to a prohibitive statute, there being, however, no vested right in anyone until the death of the insured.

In *Kring* v. *State of Missouri*, 107 U. S., 221; 2 Sup. Ct., 443, the question of *ex post facto* legislation was exhaustively discussed, and Mr. Justice Matthews wrote a dissenting opinion, in which Chief Justice Waite, Mr. Justice Bradley and Mr. Justice Gray concurred. He said in the course of the opinion:

"It is doubtless quite true that it is difficult to draw the "line in particular cases beyond which legislative power "over remedies and procedure can not pass without touch- "ing upon the substantial rights of the parties affected, as "it is impossible to fix that boundary by any general words. "The same difficulty is encountered, as the same principle "applies, in determining, in civil cases, how far the legis- "lature may modify the remedy without impairing or en- "larging the obligation of contracts. Every case must be "decided upon its own circumstances, as the question con- "tinually arises and requires an answer. But it is a familiar "principle that, before rights derived under public laws "have become vested in particular individuals, the state, "for its own convenience and the public good, may amend "or repeal the law without just cause of complaint."

Foreign insurance companies were permitted to do business in Missouri upon condition, among other things, that their contracts should be subject to the provisions of the suicide statute, and such conditions must be and remain within the power of the legislature to continue, alter or remove, according to the demands of the public interest. There can be no vested right in the company or the individual policy holder to have the conditions remain the same; though the legislature would not, in any event, be competent to change or avoid the terms of a contract entered into voluntarily by the parties, by a subsequent statute. So, in the case of *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S., 602; 19 Sup. Ct., 308, the State of Tennessee had prescribed that

a company seeking to do business within its border should appoint an agent upon whom service of process might be made, and the company complied with the act. Afterwards the state provided that service on foreign corporations might be made upon other agents. Service was made upon a special agent of the company, judgment went by default, and the company brought its bill to set aside the judgment, on the ground that it had a right to be served under the provisions of the former law. Discussing the later statute this court went on as follows:

"Statutes of this kind reflect and execute the general pol-
"icy of the state upon matters of public interest, and each
"subsequet legislature has equal power to legislate upon the
"same subject. The legislature has power at any time to
"repeal or modify the act granting such permission, making
"proper provision, when necessary, in regard to the rights
"of property of the company already acquired and pro-
"tecting such rights from any illegal interference or in-
"jury. (*Douglas* v. *Kentucky*, 168 U. S., 488; 18 Sup.
Ct., 199.)"

And, again:

"Having the right to impose such terms as it may see
"fit upon a corporation of this kind as a condition upon
"which it will permit the corporation to do business within
"its borders, the state is not thereafter and perpetually con-
"fined to those conditions which it made at the time that
"a foreign corporation may have availed itself of the right
"given by the state, but it may alter them at its pleasure.
"In all such cases there can be no contract springing from
"a compliance with the terms of the act, and no irrepeal-
"able law, because they are what is termed 'governmental
"subjects,' and hence within the category which permits the
"legislature of a state to legislate upon those subjects from
"time to time, as the public interests may seem to it to
"require.

"As these statutes involve public interests, legislation

" regarding them are necessarily public laws, and as stated
" in *Newton* v. *Commissioners*, 100 U. S., 548, at page 559:
" 'Every succeeding legislature possesses the same jurisdic-
" tion and power with respect to them as its predecessors.
" The latter have the same power of repeal and modification
" which the former had of enactment, neither more nor less.
" All occupy, in this respect, a footing of perfect equality.
" This must necessarily be so in the nature of things. It is
" vital to the public welfare that each one should be able at
" all times to do whatever the varying circumstances and
" present exigencies touching the subject involved may re-
" quire. A different result would be fraught with evil.' "

II.

Passing to the construction of the suicide statute, it may be well to call attention to the use of the words *"committed suicide,"* as they appear in the statute in connection with the subject-matter of insurance. Their plain, ordinary and usual meaning apart from insurance has been fully discussed in the original brief on pages 39 to 42.

By a long line of judicial decisions, previous to the enactment of the suicide statute, the words "commit suicide" had been held to include only the "act of a person in the " possession of his ordinary reasoning faculties," a sane man.

Ins. Co. v. *Terry* (1872), 15 Wall., 580; 21 L. Ed., 236.

Phadenhauer v. *Ins. Co.* (1872), 19 Am. Rep., 623; 7 Heiskell, 567.

Ins. Co. v. *Isett* (1873), 74 Pa. St., 176.

Phillips v. *La. Eq. Life* (1874), 26 La. An., 404.

Pierce v. *Travelers' Ins. Co.* (1874), 34 Wis., 389.

Moore v. *Ins. Co.* (1874), 1 Flipp., 363.

Merritt v. *Ins. Co.* (1875), 55 Ga., 103.

Bigelow v. *Ins. Co.* (1876), 93 U. S., 284.

Life Assoc. v. *Waller* (1876), 57 Ga., 533.

Ins. Co. v. *Rodel* (1877), 95 U. S., 235; 24 L. Ed., 433.

Ins. Co. v. *Groom* (1878), 86 Pa. St., 96; 27 Am. Rep., 689.

Newton v. *Ins. Co.* (1879), 76 N. Y., 426; 32 Am. Rep., 325.

Schiffer v. *Ins. Co.* (1879), 25 Minn., 534.

Whether the words be taken in their "plain, ordinary and usual" sense, or as words of art in their technical legal sense, they are not broad enough to comprehend the death of Jarman, who "took his own life, while insane to such an "extent as to be incapable of understanding the nature or "consequences of his act." Under the stipulation, if the statute "does not operate against" the petitioner, the recovery shall be limited to the sum of $811.83, the amount paid in assessments. (Rec., 6. Eleventh.)

III.

The weight of authority is very strongly in favor of the doctrine that when a member of a mutual benefit association agrees in his contract with such association to be bound by the laws, rules and regulations of the association then existing and by those which may thereafter be properly adopted, he is, by the force of this agreement, bound by all the subsequent amendments to such laws, rules and regulations. The following are part only of the authorities to this effect. Under each case a brief statement of the nature of the change

is made, and a part of the language of the court in regard to the above proposition is quoted:

UNITED STATES SUPREME COURT.

Korn v. *Mut. Assurance Soc.* (1810), 6 Cranch., 192:

The change involved a new classification of membership and a new distribution of funds.

"'We will abide by, observe and adhere to the constitution, "rules and regulations which are already established or "may hereafter be established.' It would be difficult to "find words of more extensive signification than these, or "better calculated to aid, explain and enforce the general "principle that the majority of a corporate body must have "power to bind its individuals."

Mutual Reserve Fund Life Assn. v. *Hamlin* (1891), 139 U. S., 297; 11 Sup. Ct., 614; 35 L. Ed., 167:

The change referred to the time of making and the number of assessments.

The contract provided:

"This certificate shall be subject to all the provisions and "stipulations contained in the constitution and by-laws of "this association, with the amendments thereto."

The court said:

"It is true the insured was informed by the defendant's "constitution, as amended July 11, 1883, *subject to which "the contract of insurance was executed*, that assessments "would regularly be made in February, April, June, August, "October and December, or any such other periods as the "directors might determine."

Supreme Lodge K. of P. v. *Withers* (1900), 177 U. S., 260; 20 Supreme Ct., 611-617; 44 L. Ed., ??:

The change provided that the collecting officer should be the agent of the member.

"In the case under consideration it may be immaterial except as bearing upon the equity of the case that the original clause was introduced into the general laws of the order in January, 1894, eleven years after the first certificate was issued to the assured, and nearly nine years after the certificate was issued upon which suit was brought. There is no evidence that it was ever called to his attention or that he had actual knowledge of it. If he were bound at all it would only be by the stipulations in his original application and by the terms of his certificates that 'he would be bound by the rules and regulations of the order now in force, or that may hereafter be enacted.'"

UNITED STATES CIRCUIT COURT OF APPEALS.

Haydel v. *Mut. Res. Fund Life Assn.* (1900), 104 Fed., 718:

One of the questions involved in this case was whether the board of directors had power to increase the rate of assessments from time to time, under the following authority:

"The board of directors shall have authority to fix and determine the amount of benefits for which certificates of membership will be issued, rates of assessments, admission fees and annual dues, and to adopt such other rules and regulations as they may deem best for the interest of the association; and the contract contained the following provisions:

"The entire contract contained in this certificate and said application, taken together, shall be governed, be subject to and construed only according to the constitution, by-laws and regulations of said association."

On the back of the policy in suit there appeared an assessment rate table, and it was claimed that this fixed the rate of assessments for the policy at all times. But the court held that this was not intended "to divest the board of directors of the power plainly conferred on them by the

"charter of the company to enact such amendments as at "any time might be found necessary to meet its death losses." The court said nothing about the prospective operation of these changes, but applied them to all policies alike. This opinion was handed down by the Circuit Court of Appeals of the Eighth Circuit on November 5, 1900, only a few weeks after the decision in the case now before the Supreme Court. The court further says:

"But it is quite evident, we think, that he (the member) "fully understood and assented to the plan on which the "defendant proposed to conduct its business, namely, that "those who became members must in any event pay the "*actual cost of insurance*, whatever it might be, or retire "from membership; and that the *managing officers reserved* "*to themselves and would exercise the power of making* "*assessments from time to time for such amounts as they* "*deemed necessary to pay accrued and accruing death loss-*"*es, and at the same time maintain an adequate reserve or* "*emergency fund.*"

Lloyd v. *Supreme Lodge K. of P.* (1899), 98 Fed., 66, 70:

The change provided that impairment of health by the use of intoxicating liquor would avoid the certificate, and it appeared that the impairment existed prior to the change.

"The stipulation that the contract 'shall be governed by "all the laws, rules and regulations of the order governing "the rank now in force or that may hereafter be enacted,' "and the condition requiring a full compliance with all "the laws governing this rank now in force or that may "hereafter be enacted, are provisions which frequently ap-"pear in like contracts between mutual benefit associations "and their members. The right so reserved in the associa-"tion is well recognized as authorizing it to subject members "to further requirements and conditions of future liability "by reasonable enactments within the objects and for the "general welfare of the association and to apply the regu-"lations to prior contracts, but to the extent only that the "conditions they impose arise after the enactment."

UNITED STATES CIRCUIT COURT.

Haydel v. *Mut. Res. Fund Life Assn.* (1899), 98 Fed., 200, 204:

This is the same case that was reviewed in the Circuit Court of Appeals, cited above, and in speaking of the contract Judge Adams said:

"The policy itself and the table on the back thereof are "made subject to the constitution, subject to the by-laws "and subject to any amendments that may be from time "to time adopted, and one becoming a member of a mutual "insurance company takes his membership subject to the "provisions of the constitution and by-laws and subject to "such changes as may be made pursuant thereto in the "rates and assessments."

SUPREME COURT OF ALABAMA.

Supreme Commandery v. *Ainsworth* (1884), 71 Ala., 436:

The change provided that suicide, sane or insane, would avoid the certificate.

Speaking of the agreement of the member to abide by future by-laws the court said:

"These are words of large signification and clearly ex- "press that the company consented that the contract should "be subject to future as well as existing by-laws. Parties "may contract in reference to laws of future enactment— "may agree to be bound and affected by them as they would "be bound and affected if such laws were existing. They "may consent that such laws may enter into and form parts "of their contracts, modifying or varying them. It is this "voluntary agreement which relieves the application of "such laws to their contracts and transactions from all im- "putations of injustice."

SUPREME COURT OF CALIFORNIA.

Stahl v. *Society* (1890), 82 Cal., 557; 22 Pac., 1125, 1126:

The change here limited the amount to be received in case of sickness, after the sickness existed and the member had received the amount to which he was limited by the change.

"In view of this power to alter the contract, it can not "be said that the defendant could not alter its by-laws in "any respect. The respondent argues, however, that it "had no power to alter them so as to impair a vested right. "The term 'vested right' is often loosely used. In one sense "every right is vested. If a man has a right at all, it must "be vested in him; otherwise, how could it be a right? The "moment a contract is made, a right is vested in each party "to have it remain unaltered, and to have it performed. The "term, however, is frequently used to designate a right "which has become so fixed that it is not subject to be di-"vested without the consent of the owner, as contradistin-"guished from rights which are subject to be divested with-"out his consent. Now, a right, whether it be of such a fixed "character or not, must be a right to something; and when "a man talks vaguely of his vested right, it conduces to "clearness to ask: 'A vested right to what?' In the pres-"ent case the plaintiff can have no right to have the con-"tract remain unchanged, because, as we have seen, the "contract itself provides that it may be changed. Nor has "he a right to remain unaffected by any change that may "be made; for if such right be common to all the members, "it is merely another way of saying that no change can be "made; and, if the right be not common to the other mem-"bers, it would be to assert a privilege or superiority over "them, of which there is no pretense. If the plaintiff has "any right which is so fixed that it is not subject to change, "we think it can only be to the fruits which ripened before "the change was made; in other words, to such sums as "became due before the new by-law was adopted."

Bowie v. *Grand Lodge* (1893), 99 Cal., 392; 34 Pac., 103:

The amendment changed the amount to be paid, and the method of computing it.

"The alleged change made in the laws of the defendant "did not impair the obligation of plaintiff's contract or af- "fect any vested right of his. The plaintiff when he be- "came a member of the defendant corporation, became also "bound by its constitution and laws, and such constitution "and laws became a part of his contract of membership. This "certificate, when read and construed, as it must be, in con- "nection with the constitution and laws of the defendant ex- "isting at the time of its issuance, and which provided that "a change might be made in the laws of defendant governing "such funds, means that the plaintiff is to participate in "the special benefit fund of defendant in an amount to be "computed according to the laws of defendant in force when "the several coupons shall mature."

(Citing the language quoted above from *Supr. Commandery* v. *Ainsworth*, 71 Ala., 436.)

Lawson v. *Howe* (1897), 50 Pac., 763, 764:

"Individuals who associate themselves in a voluntary "fraternal organization may prescribe conditions upon "which membership in the association may be acquired, or "upon which it may continue, and may also prescribe rules "of conduct for themselves during their membership, with "penalties for their violation, and the tribunal and mode in "which the offenses shall be determined and the penalty "enforced. These rules constitute their agreement, and "unless they contravene some law of the land, are regarded "in the same light as the terms of any other contract."

CONNECTICUT SUPREME COURT.

Massachusetts Mut. Ben. Assn. v. *Severson* (1899), 71 Conn., 719; 43 Atl., 192:

The amendment changed the provisions referring to beneficiaries.

"The terms of the contract between the members imply "a submission to such changes in this matter as the associa- "tion may make. These changes apply to all members "alike and the by-laws in force at the death of the member "determine the disposition of the fund."

ILLINOIS SUPREME COURT.

Supreme Lodge K. of P. v. *Kutscher* (1899), 179 Ill., 340; 53 N. E., 620, 622:

The change provided that self-destruction would avoid the contract.

"By force of his contract he and his beneficiary were "bound by it (a subsequent by-law), although it was adopt- "ed after he became a member and received his certificate."

Supreme Lodge K. of P. v. *Trebbe* (1899), 179 Ill., 348, 355; 53 N. E., 730:

The change was the same as in the last case.

"The power of the society, derived from its charter and "the laws under which it was organized, to enact by-laws, "is continuous, residing in all regular meetings of the so- "ciety as long as it exists. Any meeting could, by a ma- "jority vote, modify or repeal the law of a previous meeting, "and no meeting could bind a subsequent one by irrepealable "acts or rules of procedure."

(Citing *Richardson* v. *Society*, 58 N. H., 188.)

Fullenwider v. *Supr. Coun. Royal League* (1899), 180 Ill., 62; 54 N. E., 485, 486:

The change involved the right to increase the rate of assessment.

"The power to enact by-laws for the government of a "corporate body is an incident to the existence of a body "corporate, and is inherent in it. The power to make such "changes as may be deemed advisable is a continuous one.

"Where the contract contains an express provision reserv-
"ing the right to amend or change by-laws, it can not be
"doubted that the society has the right so to do; and where,
"in a certificate of membership, it is provided that mem-
"bers shall be bound by the rules and regulations now govern-
"ing the council and fund, or that may thereafter be enact-
"ed for such government, and those conditions are assented
"to, and the member accepts the certificate under the con-
"ditions provided therein, it is a sufficient reservation of
"the right in the society to amend or change its by-laws.
"The contract requiring compliance with any by-laws that
"might be thereafter enacted, and the certificate being ac-
"cepted with such a clause therein, there is no vested right
"of having the contract in the certificate remain unchanged,
"because the recognition of the power to make new by-laws
"is necessarily a recognition of the right to repeal or amend
"those theretofore made."

Baldwin v. *Begley* (1900), 56 N. E., 1065, 1068; 185 Ill., 180:

The change affected the designation of beneficiaries.

"A party can not claim the right to have a contract re-
"main unaltered, when the contract itself provides that it
"may be changed."

(Citing the above Illinois cases.)

Covenant Mut. Life Assn. v. *Kentner* (1900), 58 N. E., 966; 188 Ill., 431:

A change was made in the rate of assessment, but there was no agreement of the member to abide by such change.

"If a member agrees that future by-laws or amendments
"shall enter into and form a part of his contract, and modify
"or vary it, he will be bound by such by-laws or amendments
"because they are a part of his contract. In *Fullenwider*
"v. *Supreme Council* the certificate was on the express con-
"dition that the member should comply in the future with
"the laws, rules and regulations that might thereafter be
"enacted by the supreme council to govern said council and

" fund, all of which were made part of the contract. The " insured expressly consented to the conditions, and it was " held that the agreement authorized a change in the rate " of assessments under a by-law which, in the opinion of the " court, was not unreasonable. Even if the certificate states " that the by-laws are a part of the contract, and that they " are subject to amendment, subsequent by-laws will be con- " strued to apply only to contracts made after the adoption " of such by-laws, in the absence of an agreement that they " shall have a retrospective effect. This is upon the prin- " ciple that all laws and by-laws have a prospective, and not " a retrospective, effect, unless the intent that they shall " have a retrospective effect is clear and unmistakable. Un- " less there is an express agreement that a member shall " be bound by future by-laws varying or modifying his con- " tract, he is not so bound."

Moerschbaecher v. *Supr. Council Royal League* (1900), 59 N. E., 17:

The member was a saloon keeper and continued in the business after the adoption of a by-law prohibiting the occupation, but providing that the member should be notified of the forfeiture. A later by-law provided that engaging in the business should be sufficient ground of forfeiture.

"The power and right to pass it (a subsequent by-law) was " reserved when said member was admitted to membership. " and he expressly covenanted to obey and be bound by all " by-laws so adopted."

Peterson v. *Gibson* (1901), 61 N. E., 127, 128:

In this case the contract provided only that the member would be bound by the constitution and by-laws of the association, in which was contained a provision that the said constitution might be amended and changed at the annual meeting of the association, but there was no provision in the contract that the member agreed to abide or be bound by

amendments adopted thereafter. The court in distinguishing this sort of a contract from one in which the member does not agree expressly to be bound by subsequent amendments said:

"It is only when a member in express terms agrees to be "bound by such constitutional amendments or by-laws as "thereafter may be enacted that he is bound by future "amendments or by-laws which *impair the obligation* of his "contract of membership injuriously."

Assn. v. *Kentner*, 188 Ill., 431; 58 N. E., 966.

Baldwin v. *Begley*, 185 Ill., 180; 56 N. E., 1065.

"In the absence of such an express agreement the contract "of membership can not be impaired by subsequent changes "effected by the association."

INDIANA SUPREME COURT.

Supr. Lodge K. P. v. *Knight* (1889), 20 N. E., 480, 485:

In this case the effect of the amendments was that a class of 16,000 members was reduced by the operation of the amendments to about 173 members. The certificate did not promise a fixed amount in any event, but promised only the payment of $1 for each of the members, *not to exceed a certain amount*. The change materially decreased the expectancy. In the case before the court the contract promised to pay a certain proportion of the money received in the death fund from the proceeds of one assessment *not to exceed a certain amount*.

The whole opinion is peculiarly applicable to this case. Among other things the court said:

"Where, as here, there is an express and clear reserva- "tion of the right to amend, the member is bound to take

" notice of the existence and effect of that reserved power. " The power to enact by-laws is inherent in every corpora- " tion as an incident of its existence. This power is a con- " tinuous one. (Nibl. Mut. Ben. Soc., Section 124.) No " one has a right to presume that by-laws will remain un- " changed. Associations and corporations have a right to " change their by-laws when the welfare of the corporation " or association requires it, and it is not forbidden by the " organic law. The power which enacts may alter or repeal. " The duly chosen and authorized representatives of the " members alone are vested with the power of determining " when a change is demanded, and with thir discretion courts " can not interfere. Were it otherwise, courts would control " all benevolent associations, all corporations, and all fra- " ternities. It is only when there is an abuse of discretion, " and a clear, unreasonable and arbitrary invasion of pri- " vate rights, that courts will assume jurisdiction over such " societies or corporations. With questions of policy, doc- " trine or discipline, courts will not interfere. Courts will " compel adherence to the charter and to the purpose for " which the society was organized, but they will not do more. " To justify interference by the courts and warrant the over- " throw of by-laws enacted in the mode prescribed by the by- " laws, it must be shown that there was an abuse of power, " or that the later by-law is unreasonable. It is not enough " to show that a better or wiser course might have been pur- " sued, for it must be shown that there was an abuse of dis- " cretion, or that the by-law is so unreasonable as to be " void. In the case before us the change from the one plan " to the other was not an arbitrary or unreasonable exercise " of power, nor was it a repudiation of a debt, nor the de- " struction of a vested right. It was not unreasonable, be- " cause it may well be that the system of insurance originally " adopted, which gave no heed to age, was so infirm as to be " incapable of long enduring. It was not arbitrary, because " the by-laws reserved the right of amendment, and a desire " to promote the welfare of the society brought about the " change. It was not the repudiation of a debt, because the " right to the avails of assessment provided for by the con- " tract was not taken away. It is to be constantly kept in " mind that the contract *does not bind the society to pay a*

"*designated sum,* absolutely and at all events; but, on the "contrary, the contract, by its express terms, limits the bene- "ficiary to a specific fund derived from assessments. What- "ever the nature of the right, it is only such as the contract "creates, no matter who becomes the party beneficially in- "terested. The contract with its limitations and conditions "is the primary source of the right to recover."

LOUISIANA SUPREME COURT.

Daughtry v. *Supr. Lodge K. of P.* (1896), 48 La. An., ??: 20 So., 712:

The change provided that suicide would avoid the contract.

"Any law enacted in pursuance of this agreement is the "voluntary consent of the members of the order made for "their mutual benefit and by their proper representatives."

Citing *Supr. Com.* v. *Ainsworth*, 71 Ala., 436.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Sargent v. *Supr. Lodge Knights of Honor* (1893), 158 Mass., 557; 33 N. E., 650:

The amendment limited the classes of beneficiaries.

"But that constitution contained a provision to the ef- "fect that it might be amended, and in 1884 it was in fact "amended to conform to a new charter obtained in Missouri "and the payment of the benefit here was limited to the mem- "bers of the holder's family and persons dependent upon "him."

The court held the amendment to be valid and binding.

Pain v. *Societe St. Jean Baptiste* (1899), 172 Mass., 319, 323; 52 N. E., 502, 503:

The change here limited the time during which benefits might be paid, and was made after the illness began.

"There can be no right to future benefits vested in one "member more than in another. The right of a sick mem- "ber to future benefits, which became vested in the plaintiff "at the time of the disability, is not a right to receive, so "long as such disability continues, the future benefits pro- "vided by the by-laws existing at the time the disability be- "gins, but simply a right to receive them subject to such "changes as may be made by the society; and it is no viola- "tion of such a vested right to make the changes at any "time. Such a change is not a repudiation of, but, on the "contrary, is in accordance with the terms of the contract. "As was said in *Smith* v. *Galloway* (1898), 1 Q. B., 71, 77, "'Where the original contract provides for alteration of the "rules, he is bound by any subsequent alteration that is "made, within the power conferred, whatever the extent of "that alteration may be.' Such an interpretation of the "contract seems to be in accordance with the provision for "amendments, and to be the only one reasonably calculated "to subserve the interests of all, and to enable the society to "accomplish the objects for which it was incorporated. We "are aware the doctrine herein enunciated is inconsistent "with some decisions in other states, but we are satisfied "that it is sustained by the better reasoning and the weight "of authority."

(Citing many of the cases herein cited.)

Messer et al. v. *Ancient Order United Workmen* (1902), 62 N. E. (Mass.), 252:

The change referred to a classification of rates according to age, the rate having been level for all ages.

"The plaintiffs contend that their certificates of member- "ship constitute a contract that can not be affected by the "recent legislation, or by changes in by-laws whereby they "are to pay classified rates for death benefits. But these "certificates are silent in regard to the rates to be paid. "They give members all the rights and privileges of mem- "bership, with a right to participate in the beneficiary fund "to the amount of $2,000, to be paid at death. This is on "condition that the member complies 'with all the laws, rules

" and requirements' of the order. The plaintiffs contend that " Pub. St., C. 115, Sec. 8, which authorizes such a corporation to 'provide in its by-laws for the payment by each " member of a fixed sum,' etc., and the subsequent statutes " prior to St. 1898, C. 474, which contains similar language, " look to a kind of insurance upon the level assessment plan, " in which the assessments to be paid by members are all " alike, without reference to their age. They also rely upon " the provision for the payment of a fixed rate in the general laws originally adopted by the corporation. If we assume, without deciding, that this contention is correct, " this mode of making assessments for the future is simply a " detail in the management of the business of the order, " which the lodge might at any time permit to be changed. " The certificate holders are members of a fraternal beneficiary association, which may, from time to time, amend " its by-laws and change its method of doing business as the " members determine for the common good. By the express " terms of the certificates the members are to be bound by " changes in the by-laws that may be made from time to " time. The legislature might change the statutes affecting " such companies, and the companies might in like manner change the by-laws under this power expressly " reserved. The case is fully covered by the decisions in *Pain* v. *Society*, 172 Mass., 319; 52 " N. E., 502; 70 Am. St. Rep., 287, and *Fullerwider* v. *Royal League*, 180 Ill., 621; 54 N. E., " 485; 72 Am. St. Rep., 239. This change in the by-laws is " not void, as an abuse of the power to make changes, on " the ground that it is calculated to defeat the purpose of the " organization and destroy the rights of the members. It may " be conceded that some amendments might be so foreign to " the general scheme and purpose of the organization, and " so contradictory to its fundamental law and the contracts " made under it, as not to be within the power of amendment " referred to. But this is not true of an amendment which " merely changes forms and methods, while the substance of " the general plan and purpose of the organization is preserved. We are of opinion, therefore, that the classified " assessments referred to in the bill are not shown to be unauthorized or illegal."

MICHIGAN SUPREME COURT.

Borgards v. *Farmers' Mut. Ins. Co.* (1890), 79 Mich., 440; 44 N. W., 856, 857:

The change exempted the company from liability for loss resulting from the use of steam power on insured's premises.

"This policy was issued and received upon the express "agreement that it was subject to all changes that should be "thereafter made in the charter and by-laws. Such con- "tract is valid. The defendant was a mutual insurance com- "pany. The plaintiff, as a member, had an equal voice with "the others in the management of its affairs. The by-law "was regularly adopted. Under the charter he could have "had his policy canceled and withdrawn. By his conduct he "assented to the by-law, and the change in the terms of his "policy caused thereby. This is not in conflict with the "principle established in *Becker* v. *Insurance Co.*, 48 Mich., "610; 12 N. W. Rep., 874. In that case there was no agree- "ment in the policy that it should be subject to change. "There the policy was declared to be subject to the charter "and by-laws, which meant, of course, the charter and by- "laws as they then existed."

MISSISSIPPI SUPREME COURT.

Dornes v. *Supr. Lodge K. of P.* (1898), 75 Miss., 466; 23 So., 191:

The change avoided the contract in case of suicide.

"In the very case relied on by learned counsel for appel- "lant (*Hobbs* v. *Association* (Iowa), 47 N. W., at page 984) "it is said: 'But it does not follow that they will be bound "by all those (by-laws) adopted after their contracts of mem- "bership are made. Whether they will be or not will de- "pend upon the terms of their contract. If that provides "that members shall be bound by all articles or by-laws which "may at any time be adopted, we know of no reason why it "is not valid. In such cases changes made are not in vio- "lation of the contract, but are in harmony with it."

MISSOURI SUPREME COURT.

Ellerbe v. *Faust* (1894), 25 S. W., 390:

The change here prohibited the occupation of saloon keeper.

MISSOURI COURT OF APPEALS.

Chadwick v. *Order of Triple Alliance*, 56 Mo. App., 463, 474.

State ex rel Schrempp v. *Grand Lodge*, 70 Mo. App., 456.

Brower v. *Supreme Lodge* (1898) (Kansas City Court of Appeals), 1 Mo. App. Rep., 226.

These Missouri cases will be noticed later.

NEW HAMPSHIRE SUPREME COURT.

Supreme Coun. American Legion of Honor v. *Adams* (1895), 44 Atl., 380, 382:

The amendment referred to the designation of beneficiaries.

"Parties may contract with reference to laws to be enacted in the future, and may agree to be bound by them. They may agree, as in this case, that *such laws may enter into and form a part of their contracts.* It must be incident to the nature and purposes of an association of this character that it should have the power to change its laws as experience and necessity require, and bind its members thereby."

PENNSYLVANIA SUPREME COURT.

Chambers v. *Supreme Tent Knights of Maccabees* (1901), 49 Atl., 784, 785:

The contract originally provided that suicide within one year would avoid it, and the change extended the time to five years.

"It was part of his contract that he would comply with "by-laws thereafter adopted. That by-laws so made are "valid, both as to the member and his beneficiary in cases "exactly like this, has been held by many courts of high "authority. (See 3 Am. & Eng. Enc. Law (2d Ed.), p. "1065; *Supreme Lodge* v. *LaMalta*, 95 Tenn., 157; 31 "S. W., 493; 30 L. R. A., 838; *Supreme Commandery* v. "*Ainsworth*, 71 Ala., 436; 46 Am. Rep., 332; *Supreme* "*Lodge* v. *Kutscher*, 179 Ill., 340; 53 N. E., 620; 70 Am. "St. Rep., 115; *Fullerwider* v. *Supreme Conn.*, 180 Ill., "621; 54 N. E., 485; 72 Am. St. Rep., 239; *Pain* v. *So-* "*ciete St. Jean Baptiste*, 172 Mass., 319; 52 N. E., 502.)"

This case distinguishes the case of *Hale* v. *Equitable Union*, 168 Pa., 377; 31 Atl., 1066, generally cited on the other side of this proposition.

RHODE ISLAND SUPREME COURT.

Supreme Council Catholic Knights v. *Morris*, 16 R. I., 468; 17 Atl., 57, 58:

The change referred to the right to change the beneficiary without such beneficiary's consent.

TENNESSEE SUPREME COURT.

Supreme Lodge K. P. v. *LaMalta* (1895), 95 Tenn., 157; 31 S. W., 493, 495:

The change added the suicide clause to the contract.

"The fact that its enactment was subsequent to the date

"of his certificate is rendered unimportant by the stipula-
"tions in the application and in the certificate itself, whereby
"he bound himself irrevocably to full obedience and sub-
"mission to all legislation then in existence or thereafter
"enacted for the government of the endowment rank, of
"which he was becoming a member."

TEXAS COURT OF CIVIL APPEALS.

West v. *Grand Lodge A. O. U. W.* (1896), 37 S. W., 966, 968:

The change related to the classes of beneficiaries.

"In the application for insurance he covenanted to be
"bound by the by-laws, rules and regulations as they then
"existed, or as they might be altered or changed afterwards.
"The certificate was granted on the same condition. The
"constitution and by-laws, with the changes made therein,
"being contracts by which he was bound, if not against pub-
"lic policy, will be enforced by the courts like other con-
"tracts. When the law was passed providing that the in-
"surance money was to be paid to beneficiaries of certain
"specified classes, to be designated by the member holding
"the certificate, it entered at once into and became a part
"of the contract of insurance. (*Hellenberg* v. *Independent*
"*Order*, 94 N. Y., 580; *Sanger* v. *Rothschild*, 123 N. Y.,
"577; 26 N. E., 3.)"

Writ of error denied by Texas Supreme Court.

Duer v. *Supreme Council, Order of Chosen Friends* (1899), 52 S. W., 109:

Here the change decreased the amount to be paid from $3,000 to $1,500, and all the money paid in assessments.

"Philip C. Duer had actual notice of the enactment of
"the new law by the order. *The assessments were less un-*
"*der the new than the old* plan. The amendment to the
"laws was regularly adopted by the body authorized to do
"so. The husband of appellant was charged with notice of
"the by-laws of the order to which he belonged, and had

"agreed to be bound by them, and appellant had no vested "right in the certificate that could not be affected by the "change of by-laws. (Bac. Ben. Soc., Sec. 91a; *Byrne* v. "*Casey*, 70 Tex., 247; 8 S. W., 38; *West* v. *Grand Lodge* "(Tex. Civ. App.), 37 S. W., 966.)"

VERMONT SUPREME COURT.

Fugure v. *Soc. St. Joseph*, 46 Ver., 369.

SUPREME COURT OF APPEALS OF VIRGINIA.

Mutual Reserve Fund Life Assn. v. *Taylor* (1901), 37 S. E., 854:

This case involved the same question decided by the Circuit Court of Appeals of the Eighth Circuit in the case of *Haydel* v. *Mut. Reserve Fund Life Assn.*, 104 Fed., 718, cited above, namely, the right to increase the rate of assessments pursuant to power reserved for that purpose. The case was decided by the lower court against the association and was reversed by the Supreme Court. It is impossible to quote from the case without making the quotation too long; but the right to make an increase in the number of assessments and in the rate of assessments was upheld in a carefully considered opinion. The court laid particular stress upon the acquiescence of the insured in the changed rate of assessments, evidenced by his continued membership and payment of the increased rates, without objection, and on this point said:

"While it is true that acquiescence in an unlawful de- "mand is not a reason why a person shall continue to ac- "quiesce, yet where the question is whether or not a right "exists, or what construction shall be placed upon an agree- "ment where its terms are not clearly defined, the acquies-

"cence by one party in the other's known construction and "compliance with its demands, is material, and throws much "light on the question at issue."

Wisconsin Supreme Court.

Schmidt v. *Supreme Tent, Knights of Maccabees* (1897), 73 N. W., 22:

Here the change prohibited the occupation of saloon keeping.

"The by-law in question (passed subsequent to issuance "of the certificate) has become a part of the contract."

Hughes v. *Wisconsin Odd Fellows' Mut. Life Assur. Co.* (1898), 73 N. W., 1015, 1018:

The change added a suicide clause to the contract.

"The subsequent by-law relied on by the company to de- "feat a recovery may be fairly said to have been consented "to by the insured. He stipulated, in substance, to be "bound by the action of the corporation at large, or of its "board of directors, in respect to its by-laws, rules and reg- "ulations. This was the effect of his contract, and, so far "from being violative of the provisions of the contract, it "is in accordance therewith, and with the consent of the as- "sured contained in his application."

This case distinguishes the case of Morrison against the same insurance company, 59 Wis., 162; 18 N. W., 13, commonly cited to support the contrary proposition of law.

Loeffler v. *Modern Woodmen of America* (1898), 75 N. W., 1012, 1014:

The change added a prohibited occupation.

It was here contended that the subsequent by-law was inoperative so far as the plaintiff was concerned, as it impaired the obligation of his contract.

"A perfect answer to such contention is that the plaintiff "accepted his benefit certificate in question 'subject to all "the conditions on the back' thereof, and named in its fun-"damental laws, and liable to forfeiture if 'the plaintiff "should not comply with the conditions, laws and such by-"laws and rules as' were then, or might thereafter 'be adopt-"ed by the head camp, or the local camp' of which he was a "member. In holding that the plaintiff, by the express "terms of his contract, is bound by the amendment so "adopted after he became a member, we are simply follow-"ing the rule recently applied by this court to other cases. "(*Schmidt* v. *Knights of Maccabees* (Wis.), 73 N. W., 22; "*Hughes* v. *Insurance Co., Id.*, 1015.)"

ENGLAND, COURT OF QUEEN'S BENCH.

Smith v. *Galloway* (1898), 1 Q. B., 71, 77:

The change here reduced the amount of benefits.

"Where the original contract provides for alteration in "the rules the member is bound by any subsequent altera-"tion that is made, within the power conferred, whatever "the extent of that alteration may be."

There are a number of decisions that amendments do not affect existing contracts, but in most of these the member did not agree to be bound by subsequent amendments.

The following cases cited by counsel are of this class:

Carnes v. *Iowa Traveling Men's Assoc.* (Iowa), 76 N. W., 683.

Hobbs v. *Assn.*, 82 Iowa, 107; 47 N. W., 893.

Seiverts v. *National Ben. Assn.*, 95 Iowa, 710; 64 N. W., 671.

(In all these Iowa cases the court declares that amendments will not affect existing contracts, unless the right to make such amendments binding is reserved.)

Spencer v. *Grand Lodge*, 65 N. Y. Supp., 1146.

Benton v. *Brotherhood*, 146 Ill., 570; 34 N. E., 939.

Moore v. *Chicago Guaranty Fund Life Soc.*, 76 Ill. App., 433; affirmed 52 N. E., 882.

(Here there was no question of a change being made in the by-laws of the association; the change involved was in the Illinois statute governing assessment insurance.)

Voigt v. *Kersten*, 164 Ill., 344; 45 N. E., 543.

(Here, again, the same change in the Illinois statute was involved. The true position of the Supreme Court of Illinois on the question is set forth in *Baldwin* v. *Begley*, 185 Ill., 180; 56 N. E., 1065. In the *Moore* and *Voigt* cases there was a change in the statute of Illinois, which limited the designation of beneficiaries, where before there was no limitation. There was no attempt on the part of the association in either case to adopt the limitation of the new statute. But in the *Baldwin* case the association adopted the limitation prescribed by the later statute, and it was held to be binding on existing contracts.)

Pokrefsky v. *Detroit Firemen's Assn.* (Mich.), 80 N. W., 240.

(There was no agreement to be bound, the member protested against the amendment, and the case was distinguished from *Borgards* v. *Farmers' Mut. Ins. Co.*, 79 Mich., 440; 44 N. W., 856, cited above.)

Hysinger v. *Supreme Lodge*, 42 Mo. App., 635.

It is said that this case is the leading case on this question in Missouri. There was no agreement in this case to "*abide by future by-laws.*" The same is true of the case of *Grand*

Lodge v. *Sater*, 44 Mo. App., 452. These cases are not in point.

In *Chadwick* v. *Order of Triple Alliance*, 56 Mo., 463, 474, the rule is recognized:

"The answer does not in terms state that these provisions "of the constitution and laws were in force when the cer- "tificates sued on were issued, *nor that the certificates were "issued subject to such subsequent changes in the constitu- "tion as the society might make. Unless one or the other "of these conditions existed the certificate was not affected "by subsequent changes in the constitution.*"

In *State ex rel.* v. *Grand Lodge*, 70 Mo. App., 456, 467, in which there was an agreement to abide by subsequent amendments, it is said:

"He agreed in advance that changes in the by-laws might "be made, and unless this change is an unreasonable one, the "respondent's right to membership and to participate in the "benefits of the order thereafter were dependent upon his "observance of the new by-law."

In *Brower* v. *Supreme Lodge*, 74 Mo. App., 490, 496, an agreement to abide by future changes in the by-laws was enforced against a contract issued before the changes were made. The change involved a great reduction in the amount otherwise to be received.

In *Ellerbe* v. *Faust*, 25 S. W., 390; 119 Mo., 653, a by-law was passed after a member had joined the order, providing that no saloon keeper should be or remain a member, and was enforced in the absence of any provision to abide by future changes. It will hardly be contended in the face of these cases that the case of *Hysinger* v. *Supreme Lodge* is the leading case in Missouri on this point.

The case of *Morrison* v. *Wisconsin Odd Fellows*, 59 Wis., 162, is expressly distinguished in *Hughes* v. *Wis. Odd Fellows*, 98 Wis., 298; 73 N. W., 1017, where it is said:

"That case is clearly distinguishable in that in that case "there was no consent, either actual or constructive, on the "part of the insured to the change either of the charter or "by-laws."

The cases which remain to be noticed are those which are cited in the opinion of the Circuit Court of Appeals, 104 Fed., 645, and several cases decided since the writ of certiorari was granted.

In *Wist* v. *Grand Lodge*, 22 Ore., 271; 29 Pac., 610, it was provided that each member should designate as his beneficiary "a member of his family or some one related to him "by blood, or who shall be dependent upon him." Prior to the passage of this by-law the member had appointed a beneficiary who did not come within this description. After stating and recognizing the rule for which we contend, the court found that it would have been impossible for the member in that case to comply with the by-law, as he had no family and no one dependent upon him. It further found that the beneficiary named had an insurable interest as a creditor. It was a case where the fund as a whole must revert to the society or be paid to the designated beneficiary. The decision was placed on the strict ground that any other construction would have been a complete repudiation of the contract.

In the case of *Startling* v. *Supreme Council*, 108 Mich., 140; 66 N. W., 340, there is no provision in regard to compliance with future amendments.

The case of *Smith* v. *Supreme Lodge K. of P.*, 3 Mo. Appeal Rep., 291, is a case in which the amendment of the Endowment Rank of the Knights of Pythias, made in 1896, which provides that if a member commits suicide he forfeits his insurance, or a portion of it, came up for construction.

The same amendment has been upheld and enforced against members who joined before its enactment in the following cases:

Supreme Lodge K. of P. v. *Kutscher*, 179 Ill., 340; 53 N. E., 620.

Supreme Lodge K. of P. v. *Trebbe*, 179 Ill., 348; 53 N. E., 730.

Supreme Lodge K. of P. v. *LaMalfa*, 95 Tenn., 157; 31 S. W., 493.

Daughtry v. *Supreme Lodge K. of P.*, 48 La. An., 1203; 20 Southern, 712.

Dormes v. *Supreme Lodge K. of P.*, 75 Miss., 466; 23 So., 191.

Therefore the opinion of the St. Louis Court of Appeals of Missouri is directly in the face of the supreme courts in the states where the other cases have arisen. Furthermore the opinion of the court seems to have been influenced in some measure by the public policy of Missouri as expressed in the suicide statute, Section 5855. The court bases its opinion principally upon the ground that because the member had paid for eighteen years, during all of which time his beneficiaries might have recovered if he had committed suicide, the subsequent amendment could not be applied to his contract. If this doctrine is correct, all the courts of last resort in all the states where the cases cited have been decided are wholly wrong. It will be admitted, we believe, that the

weight of authority is wholly against the proposition laid down by the Court of Appeals in the *Smith* case.

The case of *Hale* v. *Equitable Aid Union*, 168 Pa., 377; 3 Atl., 1066, has been reviewed and distinguished in the recent case of *Chambers* v. *Supreme Tent* (Pa.), 49 Atlantic, 784, in which the amendment increased the term within which suicide would avoid the contract from one year, as originally provided, to five years.

The court say:

"The defendant's obligation to pay the benefit was conditioned upon the member's compliance with the laws of the order then in force or that might thereafter be adopted. This case is very different from *Hale* v. *Union*, 168 Pa., 371; 31 Atl., 1066. In that case the certificate of membership stipulated that at the expiration of twelve years the member, if living and in good standing, should receive one-half of the amount of his certificate; and while, there, the right to amend the by-laws was reserved to the order, it was held that such specific agreement to pay a certain amount at a certain time was not necessarily a part of the constitution and by-laws. And besides, as I understand that case, the by-laws in question were not changed until after plaintiff's rights had become vested. In the case at bar, had said George F. Chambers died before the amendment to the by-laws, a different case would be presented. Then the case of *Becker* v. *Society*, 144 Pa., 232; 22 Atl., 699, would be in point; for it is there held that, where a society has become liable to a member for sick benefits, it can not avoid such liability by a subsequent amendment of its by-laws. But it is there stated that had such amendment been made before the member was taken sick he would have been bound by it. And said last-named case reaffirms the case of *Society* v. *McVey*, 92 Pa., 510, where it was held that 'a member of an incorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief.'"

A more carefully considered case involving a contract identical with that considered in *Hale* v. *Equitable Aid Union*, *supra*, is that of *Weiler* v. *Equitable Aid Union*, 36 N. Y. Supp., 734; 92 Hun, 277, where the rule is recognized that where the power is reserved to make future amendments they should be applied to the contract, but stating that the change adopted in that case involved a departure from the plan and purposes of the society. As a matter of fact, the original certificate was in the nature of an endowment certificate payable for a certain amount at the expiration of a certain time and no provision appears that the amount to be paid was uncertain or dependent upon the collection of an assessment "not to exceed a designated amount." The change provided that if the member lived to the expectation of life, which any member might fail to do, and was then totally physically disabled, he should receive one-tenth of the amount of his certificate. The court held that the change was a departure from the original purpose of the society and was therefore unreasonable and void.

Here will be noticed the case of *Supreme Council American Legion of Honor* v. *Getz* (C. C. A., 3d Circuit), 112 Fed., 119, in which the only authority cited was the above case, *Hale* v. *Equit. Aid Union*. The *Getz* case was decided December 4, 1901, and the *Chambers* case on July 17, 1901, and yet the Circuit Court of Appeals says that the *Hale* case "is to-day the law as interpreted by its (Pennsylvania's) "court of last resort." The amendment of the by-laws in the *Getz* case was as follows: "Two thousand dollars shall "be the highest amount paid by the order on the death of a "member, on any benefit certificate heretofore or hereafter

"issued." The certificate was for the sum of $5,000. There was absolutely nothing to show that there was any necessity or reason for making this arbitrary reduction of the amount to be paid, the decision resting on the defect in the affidavit of defense, which did not show any assent by the member. (See the same case, 109 Fed., 261, where the facts are more fully set forth.) The member was represented only "by a duly accredited representative" in the body which attempted to make the change, and the trial court held that this was "but to vaguely state conclusions, which the court by being "informed of the facts, should itself have been enabled to "accept or reject."

The case of *Gaul* v. *Supreme Council* (Tenn.), 64 S. W., 1070, involves exactly the same form of contract as the *Getz* case, and contains an exhaustive history of the by-laws relating to payment and the change in question. It is one of the most exhaustive and interesting discussions of the subject to be found in the reports. The court held that the association did not have the power to pass the by-law in question, and that neither the motives which actuated the change, nor its reasonableness, should be considered. The dissenting opinion of Judge Wilson, a member of the Court of Chancery Appeals, quoted at length by the Supreme Court, took practically, though not expressly, the same ground. His language is as follows:

"The reserved right of legislation with respect to its by-"laws, agreed to by the complainant, meant in fact and in "contemplation of law, or ought to be held by the courts to "have meant, in order to preserve any regard for the obli-"gation of the insurance contracts, that it could pass by-"laws, changing the method of doing its business, levying "and collecting premiums or assessments from its insured

"members, and onerating them with additional reasonable "duties or burdens for the preservation of their contracts. "To express the idea in a different form, the reserved right "of legislation was one of preservation, and not one of de- "struction of its contracts."

The *Gaut* case was brought before the courts by a bill filed by Gaut to compel the society to recognize his certificate for $5,000, the original amount; that is, he attacked the legislation at the time when the society sought to enforce it against his contract. After the amendment the society refused to accept assessments for more than $2,000, and he brought an action to compel it to accept assessments for $5,000. If he had quietly acquiesced in the change and paid his assessments on the reduced amount, without objection, as Jarman did for years, would the result have been the same? We think not.

However, accepting the rule as stated above, for the purposes of the discussion, it still remains an open question whether the amendments in the *Jarman* case tended to preserve or to destroy the contracts of members. Only by a painstaking investigation of the financial condition, the gain and loss of membership, the difficulties of explanation entailed by a contract to return "all the money paid in assessments," as well as the face amount of the contract, the amount paid out on account of this feature, and the decrease in the number of assessments made possible by the change, can give the court any adequate idea of whether or not the change did or did not tend to preserve or destroy the contracts of the members. Suggestions touching these points were treated by the trial court in this case as the "re-

finements of an insurance expert," and unworthy of consideration.

The true rule appears to be this: Under the power reserved to make amendments, there is no limitation, except that the amendments shall be made in good faith for the welfare of the association, and for the preservation of its usefulness. It remains to determine what authority shall say finally what amendments come within the above rule, and here we find the established rule that matters of internal discipline and management lie wholly within the power of the association, so long as it confines itself to what is not arbitrary and unreasonable. This is the underlying test of Judge Wilson in the above case. He says that the company can not cut down the money contract obligation, but he gives no reason for this. He separates this element of the contract from all others and says that it shall be inviolable under the power reserved to amend. But by what authority is it thus separated, except the fiat of the court? In effect he says the court will not permit the parties to contract in any manner which will authorize the reduction of the amount to be paid, even though the amount depends upon the contingency of one assessment being sufficient to pay the amount. This is the same ground taken by the Circuit Court of Appeals in the *Jarman* case, and, indeed, the opinion is quoted at length in the *Gaut* case, and no doubt influenced the decision.

Let us take a hypothetical case. Suppose the petitioner company was, at the time of making the first amendment in 1889 (Rec., 26), realizing from one assessment about $4,500. The beneficiary could not recover more than this amount

under the constitution, as it then stood. The amount realized from one assessment remaining the same and the amendment having no effect upon antecedent contracts, what would be the condition after the amendment of 1894? (Rec., 26.) After that time the company was obligated to pay the full amount of the contracts thereafter issued, without regard to the amount realized from one assessment, as before, and whether or not the amendment was applied to existing contracts. The result would have been that every death loss on a new contract would have decreased the amount of money on hand, if any, and more than one assessment must have been made for each death under the new contracts. The old contract, however, would be entitled only to the amount realized from one assessment if it is not affected by the changes. So soon as this condition came to the old members' notice by more frequent calls for assessments, they would drop the insurance as unsafe and inequitable, as it would be. It was to avoid this condition that the change was made and applied; to avoid the necessity of more assessments, the necessity of explaining the apparent incongruity of the contract and, in short, to better preserve the interests of the society and its members. It would be imputing small common sense and an inability to understand their own interests to say that they made the change of 1894, believing it to be operative as to new contracts only. After all, the society itself must determine whether or not the change is to promote its welfare, and if it does not appear so arbitrary or unreasonable as to be void or to be a departure from the objects and purposes of the society, it should be upheld. There is one more condition which should be complied with, which is, that the

change should operate upon all the members equitably, and proportionately. In the *Gaul* case it appears that the change prohibited the payment thereafter of more than $2,000, without respect to whether one had a certificate for $2,000, $3,000, $4,000 or $5,000. The loss of membership, and the financial condition of the society, may have been such that a change was needed to prevent dissolution. In fact such a condition was intimated by the Chancellor. But, the change made should not have cut the $5,000 certificate to $2,000 and left the $2,000 certificate untouched. The cut should have been proportionate, and in this the action was arbitrary and unreasonable. But conceding that it was not open to this objection, which was not noticed by the court, and that if not enforced, the alternative was dissolution or even prospective dissolution, what benefit does the member gain by having his $5,000 certificate recognized? If the power does not remain to pay any certificate or even if a fear that this condition will arise is created, what matters it, whether his certificate be for $5,000 or $2,000? Again, if dissolution is imminent, the court should uphold every reasonable attempt to save something from the wreck, and not bring about dissolution by requiring the impossible, and thus depriving the members of their insurance when, as it says, they may and probably will be unable to secure insurance elsewhere. If the mere fact of becoming unable to carry out the plan proposed constitutes a cause for dissolution it is competent for the state to act, and it is its duty to do so. Thus by pursuing the argument of Judge Wilson to its logical sequence, we perceive that while the contracts may be preserved, the ability to execute them may be lost and they become valueless.

The obvious answer is that the burdens may be increased, and this is true, but this expedient may not bring about the desired result. It fails to take into consideration a tendency common to all insurance organizations, namely, that when there is doubt as to the stability of an institution, the good risks drop out at the first alarm and procure insurance elsewhere, while the impaired risks remain if possible, and the result is that instead of an association of average risks, there is an aggregation of unhealthy men, not insurable elsewhere; the proportionate death rate becomes constantly greater, bringing about dissolution. The signal of alarm is an increase of assessments, no matter how good may be the reason for it. Thus the conditions may be such that an increase of burdens will bring on or intensify the tendency to leave the sinking ship rather than pay an increased rate of passage for the privilege of staying aboard. The unhealthy, the aged, the infirm can not swim and they stay, while the vigorous and the strong leave the sinking craft. But by decreasing the burden to be carried by the association and the benefits to be expected by the members, the association may be held together; it may rehabilitate itself by the acquisition of new blood, and save something. This leads irresistibly to the conclusion that the society is the best judge of its needs and possibilities. There is no advantage to the society in thus cutting down the amount of insurance in force. An increase in insurance in force is the great desideratum of every company and every association, and it is only as a last resort that such an expedient as the reduction of the amount to be paid will be made in any event. I do not wish to be understood as saying that the

amendments made by the petitioner were made as a last resort, but they were made in good faith for the welfare of the association, and for the purpose of avoiding the necessity of an increase in the number of assessments. By referring to "Exhibit E" (Rec., 31) it will be perceived that in 1885 there were but two assessments; in 1889 there were ten assessments; in 1894 there were fifteen assessments, and in 1898 thre were eighteen assessments, a very rapid increase. The cause is apparent. In 1885 the death losses amounted to $3 for each member; in 1889, the amount was $26; in 1894 it was $40, and in 1898 it was $63 for each member. The increase in the number of assessments was made necessary by increased death losses. By column 14 of the same table, it appears that $74,766 were paid out by way of returning to beneficiaries the money paid in assessments, which was equivalent to about eight assessments. The reason for discontinuing the payment of amounts received in assessments is obvious. The increased death rate was increasing the number of assessments rapidly and this increase resulted in holding the membership stationary, as appears in column 2. Since 1898 the Company has lost membership steadily.

The reservation of power to amend a contract avoids the objection that the contemplated amendments are retrospective when they are applied to contracts in existence. This is the very purpose of the reservation. There can be no vested right in the continuance of the contract as it is, in view of such a reservation. The amendment would necessarily and at once affect all future transactions, without regard to the reserved power. Since the *Dartmouth College* case the

courts have held that a charter given by the sovereign amounts to a contract within the meaning of the Federal constitution. But this doctrine led the several states very generally to insert in every special charter, and almost universally in general incorporation laws, a clause reserving the right to "alter, amend or repeal" the charter or the general law. When in such contingency it is claimed that rights are vested under the charters as originally granted, whether under special or general laws, and that the later legislation impairs the obligation of the contracts or is retrospective, the courts hold that it is not obnoxious to either objection.

Matter of Lee's Bank, 21 N. Y., 9, 15.

Matter of Reciprocity Bank, 22 N. Y., 9, 14.

Hamilton Gas Light & Coke Co. v. *City of Hamilton*, 146 U. S., 258; 13 Sup. Ct., 90.

Charlotte, C. A. R. Co. v. *Gibbes*, 27 S. C., 385; 4 S. E., 49.

In the first case cited, a banking association formed under the New York banking law of 1838, had provided in its articles of association that the shareholders should not be personally liable for any contract or debt of the association; the general banking law reserved the right to alter or repeal it, as the legislature saw fit. In 1849 an amendment was enacted which made shareholders personally responsible for the debts contracted by the corporation, after January 1, 1850. After this date debts were contracted in a large sum, and an action was brought by the receiver of the bank to enforce the stockholders' liability created by the Act of 1849. The principal contention of the stockholders was that this legislation impaired the obligation of their contracts as stock-

holders, because, controlling only a minority of the stock, they were unable to prevent the action of the bank in the issuance of bank notes, that the action taken was without their consent, "implicated its stockholders in a liability which they had not consented to assume, and which, on the contrary, they had declared they would not incur." Judge DENIO disposed of their contention in the following apt language:

"But they had voluntarily consented to become stock-
"holders upon the conditions held out by the general bank-
"ing law. One of these conditions was that the legislature
"might amend and alter the act, and in that way change and
"modify the constitution of the corporation. A change
"under this reservation to alter might render their invest-
"ment more or less profitable and their condition more or
"less hazardous. Whatever peril it entailed they consented
"to assume. Stockholders can not put in the plea *non*
"*hace in fœdera veni;* for, although they have not by a
"direct act become parties to the contracts of the association,
"they have conferred powers upon others to contract, to a
"limited extent, in their behalf. In the first place they have
"empowered the corporation to affect their individual in-
"terests to the extent of the corporate authority, and
"then have agreed that the corporate power may be changed
"by the legislature. That change might operate by way of
"restriction or extension. In fact it was materially en-
"larged. Originally the acts of the corporation could only
"affect the shareholders to the amount of their contribu-
"tions to the capital stock, but by the enlargement of its
"powers it was enabled to make contracts which might call
"for a further contribution of an equal amount. The super-
"added liability is as clearly within their contract as that
"incurred in the first instance; for it has been incurred,
"according to the terms of an arrangement to which they
"were parties. In the two cases referred to from Kernan's
"Reports the defendants insisted that they had never con-
"tracted to embark their money in the enterprises which
"were being actually prosecuted by the directors; but the

"answer which this court gave was that they had volun-
"tarily embarked their credit in corporations, whose powers
"were liable to be enlarged by the legislature."

This court is committed to the same doctrine. In the *Hamilton Gas Light* case, above cited, the Constitution of Ohio was shown to contain a provision that "no special "privileges or immunities shall ever be granted, that may "not be altered, revoked or repealed by the general as-"sembly," and that "corporations may be formed under gen-"eral laws, but all such laws may from time to time be al-"tered or repealed." Under an ordinance purporting to grant the "exclusive privilege of laying pipes," etc., the appellant claimed that a subsequent statute enabling the city to build a gas plant for itself or purchase any such plant then in existence was an impairment of its contract with the city. Discussing the claim Mr. Justice HARLAN said:

"This conclusion is required by other considerations. By "the constitution of Ohio, adopted in 1851, it was declared "that 'no special privileges or immunities shall ever be "granted, that may not be altered, revoked or repealed by "the general assembly'; that 'the general assembly shall pass "no special act conferring corporate powers' and that 'cor-"porations may be formed under general laws, but all such "laws may, from time to time, be altered or repealed.' "Const. Ohio, Sec. 2, Art. 1; Sections 1, 2, Art. 13. If "the statute under which the plaintiff became incorporated "be construed as giving it the exclusive privilege, so long as "it met the requirements of law, of supplying gaslight to "the City of Hamilton and its inhabitants by means of "pipes laid in the public ways, there is no escape from the "conclusion that such a grant, as respects, at least, its ex-"clusive character, was subject to the power of the legis-"lature, reserved by the state constitution, of altering or "revoking it. This reservation of power to alter or revoke "a grant of special privileges necessarily became a part

"of the charter of every corporation formed under the gen-
"eral statute providing for the formation of corporations.
"A legislative grant to a corporation, of special privileges,
"if not forbidden by the constitution, may be a contract;
"but where one of the conditions of the grant
"is that the legislature may alter or revoke it,
"a law altering or revoking, or which has the
"effect to alter or revoke, the exclusive character of such
"privileges, can not be regarded as one impairing the ob-
"ligation of the contract, whatever may be the motive of the
"legislature, or however harshly such legislation may oper-
"ate, in the particular case, upon the corporation or parties
"affected by it. The corporation, by accepting the grant
"subject to the legislative power so reserved by the consti-
"tution, must be held to have assented to such reservation.
"* * * All this may be done at the pleasure of the
"legislature. That body need give no reason for its action
"in the matter. The validity of such action does not de-
"pend on the necessity for it, or on the soundness of the
"reasons which prompted it. The words 'at the pleasure
"of the legislature' are not in the clauses of the constitution
"of Ohio, or in the statutes to which we have referred. But
"the general reservation of the power to alter, revoke or
"repeal a grant of special privileges necessarily implies that
"the power may be exerted at the pleasure of the legis-
"lature."

In the *Charlotte, C. & A. R. Co.* case, above cited, the subsequent amendment imposed upon the appellant a tax to support the office of railroad commissioner; after deciding that the legislature had the power to amend the charter of the company, the court inquired whether or not the act in question went beyond the power reserved, to alter, amend or repeal any corporation charter. The court held, in substance, "that the act was a part of the charter, inasmuch as
"the charter was granted and accepted after the passage of
"the act. If, then, the legislature could incorporate into
"the charter the provisions of the act imposing the liability

"complained of at the beginning, without violating the sec-
"tions of the constitution relied on here as to taxation, etc.,
"why could it not do so after the organization of the com-
"pany as well?—the reservation of power to amend, etc.,
"having prevented the vesting of right, beyond the reach
"of such amendment. The ground upon which we held
"that this could be done in the *Greenville & Columbia* case,
"4 Rich., 89, was the consent of the company, thereby waiv-
"ing all objection, constitutional or otherwise. So, here,
"the appellant contracted to take its existence under an
"unlimited power in the legislature to alter, amend and re-
"peal, and it is too late now to complain. *Consensus facit*
"*jus*. It may be said, however, that this consent was given
"under the protection of the constitutional provisions in-
"voked, and therefore it was never understood or agreed
"that these guaranties of the constitution, as to the rights
"mentioned, should be violated, but that this reserved
"power of amendment referred to the ordinary amendments,
"etc., such as would not affect the substantial rights con-
"ferred. The power reserved is very broad, according to
"the terms of the act. It covers the whole subject, 'amend-
"ment, alteration and repeal,' and there certainly is no
"limitation in the language used. Nor do we know where
"to fix the boundary, except it should not go beyond the
"ends to be accomplished or intended to be subserved by
"the reservation, which no doubt was regulation, control
"and supervision, to the end that public interests might be
"protected, as well as that of the corporations. We do not
"see that the act in question transcends this boundary. On
"the contrary, it seems to be within it."

It appears from these cases that persons may contract with the state in such a way that the state may thereafter alter, modify or repeal the contract, *notwithstanding* the provisions of the Federal constitution that no state may by legislation impair the obligation of a contract, and that the language of the reservation will be construed liberally to accomplish the purpose intended; that legislative enactments refer to existing contracts from their enactment because of the agreement of the parties.

Is it not fairly within the freedom of contract, then, for men, who are becoming members of a mutual association for insurance purposes, to agree that their contracts shall be subject to every amendment to the constitution, upon the terms of which, all the rights and relations of all the members depend, when there is *no* provision in the organic law of the association which prevents a subsequent amendment from impairing the obligation of the contract, or what would be its obligation, if unchanged, and on the other hand there is a provision for its amendment, if necessary. The provisions of the Federal and State constitutions do not prohibit any private corporation from changing its contracts with its stockholders and this is done daily, and the only claim that such legislation by a corporation is obnoxious to the above principle is that the policy of the law is against such a change, because the organic law prohibits states from impairing contracts. The true inquiry would appear to be whether or not the individual has entered into a contract so improvident that the courts will not permit it to be enforced, but on more careful consideration, it appears that

all are in exactly the same position and are equally affected by the change, and for this reason, courts will not interfere.

The Circuit Court of Appeals has based its opinion on this branch of the case on two propositions, namely, that because the amendments do not appear to be retrospective, they are prospective, and that even though the association has the power to amend and the amendments were intended to apply to all contracts, the court will place a limitation upon the words of the agreement and determine what the court considers a "reasonable interpretation" of the language in question. It needs no demonstration to show that all amendments were intended to apply to all contracts, for any other intention would make the words used, "I agree to abide by all constitutional amendments" insensible and meaningless. Equality and similarity of position and relations are made possible by this provision and make for the stability of the institution. In view of similar provisions, the courts and counsel in the cases first above cited did not even raise the question. The Circuit Court of Appeals, perceiving no doubt the weakness of this position, placed its main reliance upon the other proposition; and we beg leave to say that this branch of the case was very inadequately considered and that the court even fell into error about statements of fact. First, there is absolutely no limitation upon the words used in the application, "I further agree to abide by the constitution, rules and regulations of the company as they now are, or may be constitutionally changed hereafter." This Court has characterized the same words in *Korn* v. *Mut. Assurance Society*, 6 Cranch, 192, by saying: "It "would be difficult to find words of more extensive signifi-

"cation than these, or better calculated to aid, explain and "enforce the general principle that the majority of a cor- "porate body must have power to bind its individuals." What necessity then arises to enforce a "reasonable interpretation" of the words, and not their plain meaning? By what process of reasoning does the court arrive at the conclusion that it is not reasonable to presume that "the appli- "cant intended to assent in advance to any changes in its "constitution and by-laws which the company saw fit to "make, even if they reduced the amount of indemnity "which the company had promised to pay in this event and "thereby lessened the value of his policy." Granting for the moment that all that is erroneously assumed in this sentence is true, it will be seen that the court does not attempt to show that the words used justified any such limitation of meaning. It is submitted that the province of the court is limited to interpretation of the words used, and is transcended when it assumes to limit the plain meaning of words used without limitation. The court proceeds to say that the member, when he agrees to abide by the constitution, as it is, or may be changed hereafter, means that he will abide by *some* of the amendments, those concerning the government of the corporation, or its mode of transacting its business, or its rules of discipline, for instance; but does not agree to abide by any amendment, which impairs any of the essential provisions of his contract. There is no such limitation in the language used. Such an interpretation amounts to saying that if an amendment seemed to any particular member to be for his advantage, he would be bound, but if he or his beneficiary thought it was not for his ad-

vantage as against all other members, they would repudiate it. But even if there were language which justified such an interpretation, what is the dividing line between what is essential and what is not? In the cases cited, the courts have found the following provisions to be non-essential, according to this test: a new classification of members; an increased number of assessments; increased rates of assessment; the suicide clause; reduction of the amount payable in case of sickness and of death; change in classes of beneficiaries; the addition of certain prohibited occupations; an extension of the period within which suicide would avoid the contract. Many of these changes resulted in certain contingencies in the entire forfeiture and termination of the contract. It is plain that the court desired to and did depart from the weight of authority in this matter, and did so entirely on the ground that it would be unreasonable to presume that a change in the maximum amount to be paid in case of death was within the contemplation of the parties. But just here the Circuit Court of Appeals erred as to the contents of the record and the purport of the certificate as it was issued. The court asserts that "the record contains no evidence that "the deceased member voted for any of the amendments "now in question or was aware of their adoption during "his lifetime." It is agreed that the amendments were made in accordance with the provisions of the constitution (Record 5, "Fifth"), which provided that "all proposed "amendments shall first be submitted in writing to the "board of directors, and if five directors approve the said "amendments, then the board shall require a notice of the

"proposed change to be given to all the members of the "company at least thirty (30) days before the time of said meeting." (Record 19, Article 8, Section 3). Mr. Jarman was then notified and had the opportunity to vote and it is immaterial whether he voted or not. He was bound to know what action was taken on the proposed amendments, of which he had notice and an opportunity to vote, at the meetings of the company.

The provisions of the certificate were that the company would in case of death pay $5,000, and all the money paid in assessments, subject to the limitation as to the amount of such payment as is provided in Section one (1) of Article 7 of the constitution. (Record, 13, Exhibit B.) This section (Record, 18) provides that a $5,000 certificate "shall "be good for all the money in the death fund arising from "one assessment; provided, it shall not exceed $5,000 and "all the money paid on the policy in assessments." When this policy was issued in 1885, an assessment did not produce $5,000; as a matter of fact the only loss paid in that year amounted to $441. Afterwards the membership increased sufficiently to make one assessment amount to more than $5,000, but there was absolutely no guaranty that this condition would be permanent. The contract contained as one of its stipulations the agreement to abide by all changes in the constitution. In 1889 (Record, 26), the above proviso was changed to read, "provided, it shall not exceed "$5,000 and all the money paid on the policy in assess- "ments for the first five years." This was the very section of the constitution which provided for payment. It did not provide for a fixed payment. The members at this time

all held certificates exactly alike. The change affected all or none of them. No vested right could accrue until the death of the member. Accepting here, for the purposes of this argument, the opinion of the Circuit Court of Appeals that the change must operate prospectively and not retrospectively, what will be the result? The company was organized in May, 1884. The amendment was made in January, 1889, before five years had elapsed. No one had then received more than the first five years' assessments and if the amendment were made to operate prospectively on each of the contracts then in existence, everyone would be treated as well as another. Even if so applied, it could not be called retrospective in its operation. It limited the amount which *might* be paid in the future, if one assessment produced more than $5,000. If one member had a vested right which could not be disturbed by the requisite three-fourths vote, so had every other member, but we contend that on the contrary, every member agreed to be bound by the action of the requisite number, and contemplated any change which the required number might think to be good for the welfare of the company.

The change of 1894 (Record, 26), repealed entirely the proviso in Section 1, of Article 7, recited in part above, and left the section as follows: "Upon due notice and satis- "factory proof of the death of a member of this company, "the board of directors shall, within sixty days, pay * * "* the amount set forth in the deceased member's policy "of membership."

Was this amendment applicable or not to existing contracts? If it was applicable, the constitution thereafter

provided, that the amount to be paid no longer depended upon the amount realized from one assessment. But in the language of the court, there is nothing in the record to show that the amendments were intended to operate retrospectively; what then was the result? The new members' death benefits did not depend upon the amount realized from one assessment. The old members' benefits remained contingent in amount upon the amount realized from one assessment. The rate of assessment has always remained the same, and the sufficiency of an assessment to pay a loss of $5,000 therefore depends upon the number of members. If after the amendment of 1894, owing to decreased membership, one assessment did not amount to $5,000, the old certificates which were not affected by the change would not produce their face amount, let alone any money paid in assessments. The shoe would then be on the other foot. The illustration brings into strong relief the inequalities which may result from permitting members, all paying on one basis, to be divided into classes by applying changes to new members and not to existing contracts. To avoid these inequalities, and to retain all the members on one plane of equality at any given time, the right to make the changes applicable to all certificates existing was made; the very fact of making the reservation of power is evidence of the intention to apply the changes to all contracts.

The application of the change of 1889 made by the company thereafter limited the amount payable to $5,000 and all money paid in assessments during the first five years; as less money had to be paid out, less money was required, and the number of assessments which would have been oth-

erwise necessary, decreased; and this in turn encouraged members to keep their certificates in good standing. The amendment of 1894, if applied to existing contracts, amounted to a guaranty that thereafter the amount payable would not depend upon the amount realized from one assessment. This was a long step in advance. There was still left the power to increase the number of assessments without amendment, depending only upon the number of deaths occurring, or to make changes considered necessary by the members collectively, whatever they might be. Up to this time every one was treated exactly alike. Every beneficiary holding a $5,000 certificate received the amount realized from one assessment not to exceed $5,000 and all the money paid in assessments for the first five years, and certificates for smaller amounts were paid in like proportion. From this time, every beneficiary of a $5,000 certificate was entitled to receive $5,000 and all the money paid in assessments during the first five years, subject to the right of amendment.

In 1896 (Record, 27), the last amendment was made by repealing Article VII, Section 4, which authorized the endorsement of the amount paid during five years on the policy and required its payment to the beneficiary. It is admitted that all then members had been contributing their share to pay to beneficiaries of deceased members the face value of certificates and all the money paid during the first five years, and that the application of the 1896 amendment to their contracts placed them in a different position with a different expectancy from that time. But it acted upon all alike, and if they desired to make the change, they had the

power. The whole argument against the application of these amendments rests upon the erroneous assumption that the interest of the member is antagonistic to the interest of the company, which is only another name for all the members. The assumption is erroneous because all are in the same position. No one knows when he is to die, and when a change is made, if all are affected, no one is injured. The chances of life and death may bring the change home to one before another; what may be considered the loss of a few will be the gain of the many, but every one takes the same chance. Furthermore, it should be observed that the member has no reserve under this plan of insurance. The amount collected is simply the cost of death losses and expenses, the balance being returned to the member in the form of a bond, available at once to pay assessments. During thirteen years' membership, Jarman paid only $811.63 for $5,000 of insurance and most of the time, more than $5,000; an average of $12.50 per annum for each $1,000 of insurance. The application of this last amendment again reduced the amount necessary for death losses, and decreased the number of assessments. If, after 1896, he no longer had the small amount of $192 of insurance, this being the amount paid in during the first five years, and he was no longer required to pay for it, what complaint had he to make, and if he might have complained when the change was applied, or at any time during his life, what right has his beneficiary to complain? Others were treated in exactly the same way.

One of the arguments advanced on the other side is that if the company has power to reduce the amount payable by

so much, what is to prevent it from reducing it one-half and finally to one dollar or one cent: there is nothing to prevent, if the power is absolute, as in this case, and the members collectively choose to exercise it. It might be equivalent to a decision to go into voluntary liquidation and in such case the funds on hand, if any, must be distributed. It is just as though ten men who have entered into a pool to pay the widow of each, upon his death, $1,000, come together and decide that they will stop contributions and divide the funds on hand. The man who enters into an assessment company, reserving unto its members collectively the power to change the relations of all its members to itself, takes up the relation with this in view, and he must abide the consequences which follow the common action. The evil, if there be one, will be corrected by enforcement of the contracts as they are made. As long as the plan lasts by which one does not know in advance how much he is to pay for a fixed amount of insurance, or on the contrary, how much insurance he is to receive for a fixed payment from time to time, and he goes into a company with others on these conditions, the right to readjust either the amount of the insurance or the amount of the payment should be preserved. This is the whole of assessment insurance in a nutshell. Its name and plan indicate that it is based, not upon the present ascertainment from past experience of the amount which shall be paid for a given amount of insurance, but upon the indefinite amount made necessary by the future experience of the particular association or society.

However, there are considerations which will deter the members from making any changes, if possible, either by

way of increasing the amount of assessments to be paid, or by decreasing the amount of insurance to be paid, and the greatest of these is self-interest, from which springs the desire to get something for nothing, or as little as maybe, and to retain that which they have.

Standing over against this is the inexorable law of life and death. If insurance is to be maintained, the indemnity must be paid and those who expect to receive must pay the representatives of those who die. Deaths occur more frequently in any group of insured men, as time goes on. In the petitioner company, the number of assessments and death rate per thousand members in each year have been as follows: (Record, 31.)

Year.	Number of Assessments.	Death rate per 1000 Members.
1885	2	.99
1886	8	5.99
1887	10	6.03
1888	10	5.13
1889	11	7.51
1890	11	8.25
1891	12	9.22
1892	15	10.77
1893	15	11.72
1894	15	10.65
1895	15	11.98
1896	16	10.57
1897	16	13.63
1898	18	15.85

This is equivalent to saying that the cost of insurance increases with the age of the company, where the cost depends directly upon the number of deaths. It is apparent that the cost in this company has increased rapidly, and yet the average cost, as seen above, is remarkably low. But human

nature is peculiar. If one gets something very cheap for awhile he begins very soon to feel that he has a vested right to have the market price remain the same. The increasing cost from time to time created dissatisfaction and it became desirable to cut off that which increased the cost, without being appreciated by the members. The proposal to do this was welcomed and adopted. From the standpoint of those interested to keep up the company, it would have served the purpose as well to make a special charge from that time for the amounts then accrued on each policy and to issue no new contracts containing the clause in controversy. This was not done. Such an increase of cost on these members would have led to greater dissatisfaction among them, and as they, and not future members had the power, they acted as to them seemed best. But the function of the court is not to say whether some other course would have been wiser; it is to enforce the contract as it was made by the parties.

We beg leave to repeat that which was said in the original brief. In such a case as this which affects not alone Jarman's beneficiary, but affects every member and every member's beneficiary, the decision should be controlled by considerations of justice and equity for all and not for Jarman's beneficiary alone. The perpetuity of the society means much to these members and to their beneficiaries, because a large percentage of those holding contracts calling for the payment, as the Circuit Court of Appeals says, of all the money paid in assessments are now uninsurable risks, both on account of age and their condition of health.

Should the essential power supposed to reside in the society to meet new contingencies and emergencies by

changes in the particulars indicated applicable to outstanding risks, be denied by this court; and if as a consequence this company should be unable to adapt its methods to the necessities imposed by changed conditions and should be compelled to liquidate, this large class of policy holders who could not go elsewhere, and their beneficiaries, would be the chief sufferers; and their rights and interests must not be overlooked by the court in the consideration of this subject.

Respectfully submitted,

S. S. Gregory,

Hervey Bryan Hicks,

Attorneys for Petitioner.